No. 94-550

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GERDA DOROTHEA DEWEERTH,

Petitioner,

vs.

EDITH MARKS BALDINGER and
WILDENSTEIN & CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Rule 15.7 of the Rules of the Court, this supplemental brief is filed by petitioner, DeWeerth, to inform the Court of an event that occurred after the filing of the petition for a writ of certiorari ("Pet.").

Prior Proceedings

On May 16, 1994, the judgment and majority opinion of the panel of the Second Circuit issued (Pet. A-1). DeWeerth's petition for rehearing was denied on August 23, 1994 (Pet. A-57). The mandate of the Circuit issued on August 31, 1994. DeWeerth's petition was filed in this Court on September 26,

1994, and respondents' brief in opposition was filed on or about October 24, 1994.

Amended Opinion

On October 27, 1994, i.e., *after* denial of DeWeerth's petition for rehearing and *after* issuance of the Circuit's mandate and the filing of DeWeerth's petition in this Court, the Circuit mailed to the parties an "Amended Opinion Filed After Petition for Rehearing." The document purports to amend certain passages of the majority opinion of May 16, 1994, occurring exclusively in part II(A) thereof. Notice of the Circuit's intention to amend the opinion of May 16th was not given to petitioner, and the amended opinion may not have been furnished to this Court. An extract from part II(A) of the amended opinion showing all changes is appended hereto.[1] Except for the amendments shown in the appendix hereto, the opinion printed as Appendix A to the petition is unchanged.

We contend that the Second Circuit was without power to amend the May 16th opinion after issuance of its mandate on August 31, but that if, arguendo, it had such power, the petition should nevertheless be granted for the reasons stated in point II of the petition (Pet. at 10).

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[1] The amended opinion is not yet reported. The May 16th opinion, originally reported in the advance sheets at 24 F.3d 416, has been withdrawn from the bound volume. *Idem*.

ARGUMENT

I.

THE SECOND CIRCUIT DID NOT HAVE POWER TO AMEND ITS OPINION AFTER ISSUANCE OF ITS MANDATE.

It is well established in the Second Circuit and other federal courts of appeals that the "issuance of the mandate from this Court terminated this Court's jurisdiction." *United States v. DiLapi*, 651 F.2d 140, 144 (2d Cir. 1981); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came."); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) (citing *Ostrer* and stating that "issuance of the mandate is an event of considerable institutional significance...."); *Johnson v. Bechtel Assoc. Prof. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam) (same); *Boston and Maine Corp. v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993) (same).

Accordingly, there was not any power in the majority of the panel to amend its opinion of May 16th on October 27th after issuance of the Circuit's mandate on August 31, 1994.

II.

THE AMENDED OPINION DOES NOT CURE THE CIRCUIT'S MISAPPLICATION OF A DE NOVO STANDARD OF REVIEW TO THE TRIAL COURT'S ORDER UNDER FED. R. CIV. P. 60(b)(6).

As the appendix to this supplemental brief shows, the amendments of the opinion of May 16th, if given effect,

purport to cure defects described in point I of the petition, namely, statements in support of the untenable theory that a diversity plaintiff "assumes the risk" that federal courts may modify state law notwithstanding the strictures of *Erie*. The amendments would change the opinion to refer chiefly to the finality of prior judgments of federal courts.

Even as amended, the opinion leaves unaffected point II of the petition: that a court of appeals, acting under the abuse-of-discretion standard, must defer to the trial court's determination under Fed. R. Civ. P. 60(b)(6) that finality must yield to claims of extraordinary injustice, a proposition the Court has itself maintained.[2] That is, if the trial judge has not committed an error of law (there is no such suggestion), and has not made an erroneous finding of fact (there is no such suggestion), and has acted reasonably (a matter conceded by the panel), then the abuse-of-discretion standard requires that the trial judge's preference for justice over finality be respected. *See Pierce v. Underwood*, 487 U.S. 552, 558, 562-63 (1988) (discussing differences between standards and urging deference to district judge in deciding "multifarious" questions). Here, the original and amended opinions of the Second Circuit apply, in effect, a de novo standard of review and substitute the judgment of the majority for the judgment of the trial judge, made after his "scholarly and thorough discussion of the issues...." (App. A-1). This was error. *Denton v. Hernandez*, 112 S.Ct. 1728, 1734 (1992) (where "dismissal is properly reviewed for an abuse of discretion, [it was] error for the Court of Appeals to review the dismissal of Hernandez's claims *de novo*.").

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[2] *See Gondeck v. Pan American World Airways*, 382 U.S. 25, 26-27 (1965) ("the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules," *quoting United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO SUPPLEMENTAL BRIEF

[EXTRACT FROM PART II(A) OF SECOND CIRCUIT AMENDED OPINION OF OCTOBER 27, 1994]*

We have carefully considered the circumstances analyzed by the district court and conclude that they do not warrant relief under Rule 60(b)(6). While acknowledging that Judge Broderick engaged in a scholarly and thorough discussion of the issues, we think that his decision [had the inappropriate effect of relieving DeWeerth of the consequences of her choice of forum] inappropriately disturbed a final judgment in a case that had been fully litigated and was long since closed. In our view, *Erie* simply does not stand for the proposition that a plaintiff is entitled to reopen a federal court case that has been closed for several years in order to gain the benefit of a newly-announced decision of a state court[, a forum in which she specifically declined to litigate her claims]. The limited holding of *Erie* is that federal courts sitting in diversity are bound to follow state law on any matter of substantive law not "governed by the Federal Constitution or by Acts of Congress." 304 U.S. at 78. However, the fact that federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6). *See Brown v. Clark Equip. Co.*, 96 F.R.D. 166, 173 (D. Me. 1982) ("mere change in decisional law does not constitute an 'extraordinary circumstance' " under Rule 60(b)(6), especially where '[p]laintiffs elected to proceed in the federal forum, thereby voluntarily depriving themselves of the opportunity to attempt to persuade the [state court]"); *Atwell v. Equifax, Inc.*, 86 F.R.D. 686, 688 (D. Md. 1980) (change in the state decisional law upon which appellate court based decision held "insufficient to warrant reopening a final

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* Deleted matter in brackets. New matter underscored.

judgment"). This principle also applies in federal cases where the Supreme Court has changed the applicable rule of law. *See Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

DeWeerth argues that this case is distinguishable because the state court did not announce a "change in the law," but rather clarified that New York law is -- and always was -- contrary to what the federal court held it to be. While we agree that *Guggenheim* did not involve a "change in the law" in the sense that it adopted a rule different from one that previously existed, we do not agree that *Guggenheim* stated that the question decided by the *DeWeerth* panel had long been settled in New York. The *Guggenheim* court stated only that New York's demand and refusal rule was well established; it did not state that the question of whether a due diligence requirement should be added to this rule was clearly settled. In fact, no earlier New York case had addressed this issue. The earlier *DeWeerth* panel noted that this question was an open one; although it would have certified the question to the New York Court of Appeals, it chose to decide the issue itself since it did not think the issue would "recur with sufficient frequency to warrant use of the certification procedure." 836 F.2d at 108 n.5.

When confronted with an unsettled issue of state law, a federal court sitting in diversity must make its best effort to predict how the state courts would decide the issue. *Stafford v. International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981). The comprehensive opinion by now Chief Judge Jon O. Newman in *DeWeerth* accordingly surveyed New York caselaw and determined that a New York court called upon to decide the issue would be likely to impose a requirement of due diligence. The decision was based in part on the fact that plaintiff's argument would create an incongruity in the treatment of *bona fide* purchasers and thieves. In New York,

the three-year statute of limitations starts running against thieves once the owner discovers that the art object has been stolen, while under plaintiff's theory, it would not start running against a good faith purchaser until he refused the owner's request to return the art object. The court determined in *DeWeerth* that this rule conflicted with a policy inherent in certain New York cases of protecting *bona fide* purchasers of stolen objects from stale claims by alleged owners. 836 F.2d at 108-09. Based on this incongruity, New York's policy of discouraging stale claims in other settings, and the fact that in most other states the limitations period begins to run when a good faith purchaser acquires stolen property thereby prompting due diligence on the part of the previous owner, we determined that New York courts would adopt a due diligence requirement for owners attempting to locate stolen property.

It turned out that the *DeWeerth* panel's prediction was wrong. However, by [filing her state law claim in a federal forum, DeWeerth assumed the risk] bringing this suit, DeWeerth exposed herself to the possibility that her adversaries would argue for a change in the applicable rules of law [and that any open question of state law would be decided by a federal as opposed to a state court]. By filing her state law claim in a federal forum, she knew that any open question of state law would be decided by a federal as opposed to a New York state court. The subsequent outcome of the *Guggenheim* decision does not impugn the integrity of the *DeWeerth* decision or the fairness of the process that was accorded DeWeerth. The result in this case would be no different if DeWeerth had filed her claim in state court and Baldinger had removed the action to federal court. The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court's interpretation of state law. However, this aspect of our dual justice system does not mean that all diversity judgments are subject to revision once a state court later addresses the litigated issues. Such a rule would be tantamount to holding

that the doctrine of finality does not apply to diversity judgments, a theory that has no basis in Erie or its progeny.

We believe that the prior DeWeerth panel made a reasonable ruling on the due diligence question given the information presented to it. In fact, [it appears that] a key reason for the *Guggenheim* court's contrary conclusion was not even presented to the *DeWeerth* panel as part of the parties' original briefing. In deciding not to adopt a due diligence requirement, the *Guggenheim* decision placed [great] considerable weight on the fact that efforts to modify the demand and refusal rule by the New York State Legislature [had been rejected] were unsuccessful. Specifically, in July 1986 Governor Mario Cuomo vetoed a bill passed by both houses of the State Legislature that would have caused the statute of limitations to start running from the time an art owner discovered or reasonably should have discovered the whereabouts of a work of art when bringing suit against certain not-for-profit institutions. As part of his veto message, Governor Cuomo stated that if the bill became law, it would have caused New York to become "a haven for cultural property stolen abroad." *See Guggenheim*, 77 N.Y.2d at 319. The *Guggenheim* court concluded that "[t]he history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonably diligence." *Id.* The existence of this bill was not discussed in the *DeWeerth* opinion and [apparently] was not brought to the attention of the court until DeWeerth filed a petition for rehearing. It is well established in this circuit that arguments raised for the first time on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result. Anderson v. Branen, 27 F.3d 29, 30 (2d Cir. 1994). It is thus likely that the prior DeWeerth panel deemed DeWeerth to have waived [Thus, the prior

DeWeerth panel was unable to consider] a key component of the argument that was ultimately successful before the New York Court of appeals.

We [think] conclude that the prior *DeWeerth* panel [made a reasonable prediction] conscientiously satisfied its duty to predict how New York courts would decide the due diligence question, and that *Erie* and its progeny require no more than this. The fact that the New York Court of Appeals subsequently reached a contrary conclusion in *Guggenheim* does not constitute an "extraordinary circumstance" that would justify reopening this case in order to achieve a similar result. There is nothing in *Erie* that suggests that consistency must be achieved at the expense of finality, or that federal cases finally disposed of must be revisited anytime an unrelated state case clarifies the applicable rules of law. Attempting to obtain such a result through Rule 60(b)(6) is simply an improvident course that would encourage countless attacks on federal judgments long since closed. While our conclusion relies in part on our belief that the prior *DeWeerth* decision fully comported with *Erie* and did not, as plaintiff suggests, mistakenly apply settled state law and reach a clearly wrong result, we note that even if those were the circumstances, the doctrine of finality would still pose a [formidable barrier] considerable hurdle to reopening the final judgment in this case. Whether, in such circumstances, the result would be different if the issue were raised within one year pursuant to Rule 60(b)(1) is an issue we need to decide.

The caselaw relied on by the district court as support for its decision is distinguishable from the present case. In *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976), the Tenth Circuit granted Rule 60(b)(6) relief based on an Oklahoma Supreme Court decision that undermined the basis for the Tenth Circuit's three-year-old dismissal of plaintiff's action. However, a major factor in the *Pierce* decision was that the change in

state law would have caused federal and state tort actions arising out of the same accident and involving the same parties to have opposite results. *See id.* at 723. [In contrast,] Whatever the merits of this rationale, as to which we express no opinion, it cannot justify the district court's decision in this case since *DeWeerth* and *Guggenheim* do not arise out of the same facts.

In *American Iron & Steel Institute v. EPA*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978), the Third Circuit recalled its mandate because a subsequent Supreme Court case called into question the reasoning of the Third Circuit's decision issued one year and four months earlier. However, the court expressly stated that the mandate was recalled in part because the original panel decision placed on the defendant "continuing" obligations the validity of which was now suspect. *See id.* at 599. As discussed more fully below, the judgment in *DeWeerth* was finite in nature and did not have ongoing consequences for the parties involved. The other cases cited by the district court have fewer factual similarities to the instant case and provide even less persuasive authority for its holding.

We believe that the district court abused its discretion in ruling that the important interest in the finality of the judgment in this case, which was more than four years old at the time of that ruling, was outweighed by any injustice DeWeerth believes she has suffered by [choosing to litigate] litigating her case in the federal as opposed to the state forum. Accordingly, we reverse the district court's decision granting her motion under Rule 60(b)(6).